Supreme Court, U.S.
FILED
APR - 2 2001

No. 001510

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH ARVIZU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erroneously departed from the totality-of-the-circumstances test that governs reasonable-suspicion determinations under the Fourth Amendment by holding that seven facts observed by a law enforcement officer were entitled to no weight and could not be considered as a matter of law.

2. Whether, under the totality-of-the-circumstances test, the Border Patrol agent in this case had reasonable suspicion that justified a stop of a vehicle near the Mexican border.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, as amended (App., *infra*, 1a-20a) is reported at 232 F.3d 1241. The oral decision of the district court (App., *infra*, 21a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2000. A petition for rehearing was denied on

December 1, 2000 (App., *infra*, 3a). On February 16, 2001, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * .

STATEMENT

Following the denial of his motion to suppress evidence in the district court, respondent entered a conditional plea of guilty to the charge of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Respondent was sentenced to ten months' imprisonment, to be followed by three years' supervised release. The court of appeals reversed.

1. On the afternoon of January 19, 1998, Border Patrol Agent Clinton Stoddard was working at a permanent Border Patrol checkpoint at the intersection of Highway I-191 and Rucker Canyon Road, near the border town of Douglas, Arizona. The checkpoint, which is 30 miles north of the Mexican border, was open and conducting vehicle inspections. App., *infra*, 4a-5a; 12/7/98 Tr. 8-10, 12, 14. Stoddard is an experienced agent who has trained other agents on smuggling detection techniques. 12/7/98 Tr. 4-7.

At approximately 2:15 p.m., a sensor monitored by the Border Patrol detected a vehicle traveling north on Leslie Canyon Road. That road begins near the border

in Douglas and parallels both I-191, which is to the west, and the boundary of the Coronado National Forest, which is to the east. App., *infra*, 4a; see Tr. 10-11 & Exh. 40.[1] A vehicle traveling north from Douglas can use Leslie Canyon Road to bypass the Border Patrol checkpoint on I-191. App., *infra*, 5a; 12/7/98 Tr. 12. Like most of Leslie Canyon Road, the portion of road where the sensor is located is unpaved dirt. App., *infra*, 4a; 12/7/98 Tr. 13. That portion of Leslie Canyon Road is used mostly by ranchers, Forest Service personnel, and the Border Patrol. App., *infra*, 4a; 12/7/98 Tr. 12. On a typical day, the sensor detects a vehicle passing by only once every two hours or so. 12/7/98 Tr. 39-40; see App., *infra*, 5a n.5.

The fact that the sensor gave an alert at about 2:15 p.m. was significant to Stoddard because that was approximately the time at which the agents who patrolled the area around the I-191 checkpoint normally returned to the checkpoint for their 3 p.m. shift change. Smugglers commonly time their passages to coincide with a shift change because the change leaves the back roads free of Border Patrol surveillance. App., *infra*, 5a & n.6; 12/7/98 Tr. 11, 31.

Agent Stoddard left the I-191 checkpoint and drove east on Rucker Canyon Road, toward Leslie Canyon Road, to investigate the sensor report. As he drove, a second sensor located north of the first sensor reported traffic, indicating that the vehicle had turned west on Rucker Canyon Road and was coming toward Stoddard

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[1] The court of appeals incorrectly stated that Leslie Canyon Road is in the Coronado National Forest. App., *infra*, 4a. Exhibits 1A and 40, introduced into evidence at the suppression hearing, are maps that show that the road is entirely outside the national forest.

and I-191. App., *infra*, 5a. The vehicle was now headed away from recreation areas in the national forest, which can be reached by driving east on Rucker Canyon Road. 12/7/98 Tr. 14-15, 36. If the vehicle next turned right (north) onto Kuykendall Cutoff Road, it would circumvent the I-191 checkpoint and could proceed to cities such as Tucson and Phoenix with very little chance of being stopped by the Border Patrol. That route along dirt roads (north on Leslie Canyon Road paralleling I-191, west on Rucker Canyon Road away from the national forest, and then north on Kuykendall Cutoff Road before reaching the I-191 checkpoint) is "a notorious route" used by illegal aliens and drug smugglers. *Id.* at 14-16.

As Stoddard drove east on Rucker Canyon Road to intercept the vehicle coming west, he spotted a minivan. Based on the timing of the sensor alarms and the absence of any other traffic, Stoddard believed that the minivan was the vehicle that had tripped the sensors. 12/7/98 Tr. 16-17. Stoddard pulled his Border Patrol vehicle to the side of the road so that he could get a good look at the minivan when it passed. App., *infra*, 5a; 12/7/98 Tr. 17. The minivan slowed dramatically when it approached Stoddard's parked Border Patrol vehicle, cutting its speed from approximately 50 to 55 miles per hour to approximately 25 to 30 miles per hour. App., *infra*, 6a; 12/7/98 Tr. 17, 40.

Stoddard saw five people in the minivan. Respondent was driving, an adult woman was in the front seat, and three children were in the back seats. App., *infra*, 6a; 12/7/98 Tr. 17-19. Respondent appeared rigid and nervous. He gripped the steering wheel tightly, and avoided eye contact with Stoddard. App., *infra*, 6a; 12/7/98 Tr. 17-18.[2] The adult passenger also appeared nervous. 12/7/98 Tr. 18. The two children in the rearmost seat sat with their knees unusually high, as if their feet were resting on top of an object on the floor of the vehicle. App., *infra*, 6a; 12/7/98 Tr. 19.

Stoddard was familiar with the local vehicles in the area, but he did not recognize the minivan. App., *infra*, 7a; 12/7/98 Tr. 22. The minivan also was out of character for the area because most vehicles that use the dirt back roads are four-wheel drive vehicles. 12/7/98 Tr. 46. The Border Patrol had discovered a minivan smuggling drugs in the same area a few weeks earlier, and Stoddard knew that smugglers commonly use minivans to carry aliens and drugs. *Id.* at 12, 18.

Stoddard followed the minivan. All three children in the vehicle then began simultaneously waving in an abnormal manner, on and off, for about five minutes while facing forward, without ever turning around to look at Stoddard. Stoddard suspected that the waving —which he testified "wasn't in a normal pattern"—was being choreographed by the adults in the vehicle. App., *infra*, 6a; 12/7/98 Tr. 20, 43-44, 55.

After turning his blinker on, then off, then on again, respondent abruptly turned north onto Kuykendall Cutoff Road, the final turn on the route that would bypass the I-191 checkpoint. App., *infra*, 6a; 12/7/98 Tr. 20-22. Around that time, Stoddard ran a license check and learned that the vehicle was registered to an

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[2] The district court rejected as not credible respondent's assertion that he was relaxed when he saw the Border Patrol vehicle. "I find it very difficult to believe," the district court stated, "that somebody carrying 125 or 128 pounds of marijuana in their vehicle is going to be relaxed when they see a law enforcement officer." App., *infra*, 24a.

address in Douglas. Stoddard recognized the address as being just four blocks north of the Mexican border, on a street that smugglers frequently used as a staging area for transporting aliens and narcotics further into the United States. App., *infra*, 7a; 12/7/98 Tr. 22-23, 48-49.

Stoddard stopped the minivan. Respondent leaned out of the driver's window and greeted Stoddard excitedly. When Stoddard asked where respondent was going, respondent said he was headed to a park, but he could not remember the name of the park.[3] Stoddard observed that respondent's hands were shaking and his forehead was sweaty, even though it was January and not hot outside. App., *infra*, 7a; 12/7/98 Tr. 25-27. Stoddard asked for and received consent to search the vehicle. App., *infra*, 7a; 12/7/98 Tr. 27-28. He opened the side door, smelled marijuana, and saw a black duffel bag under the feet of the two children in the back seat. 12/7/98 Tr. 28-29. Respondent consented to a search of the duffel bag, whereupon Stoddard discovered marijuana wrapped in cellophane. Border Patrol agents later found another bag of marijuana behind the rear seat. *Id.* at 29-30. The weight of the marijuana found in the minivan was approximately 125 pounds. *Id.* at 138.

2. Respondent moved to suppress the marijuana on the ground that Stoddard lacked reasonable suspicion to stop the minivan and lacked authority to search it. After taking testimony from Stoddard, 12/7/98 Tr. 3-58, an investigator employed by respondent's counsel, *id.* at 58-82, respondent, *id.* at 82-98, and respondent's

[3] Respondent testified at the suppression hearing that he was going to a location known as Turkey Creek to meet a man whom he did not know, who would be driving a Ford pickup truck. 12/7/98 Tr. 95-96.

adult passenger (who was his sister), *id.* at 98-111, and after hearing argument on the motion, *id.* at 111-134, the district court ruled that Stoddard had reasonable suspicion to stop the minivan. Stating that the evidence had to be considered "in the context of what was going on out there and in the context of the information available to the officer," App., *infra*, 22a, the district court identified ten specific facts that supported Stoddard's suspicion of illegal activity:

> (1) The minivan was on "poorly traveled" roads that are "used to circumvent the [I-191 Border Patrol] checkpoint." *Id.* at 22a-23a; see also *id.* at 23a (Leslie Canyon Road "certainly isn't a heavily traveled road by any stretch of the imagination").
>
> (2) The minivan had passed the only recreation area in the vicinity (at Rucker Canyon Road), and the next recreation area was "quite a few miles to the north," at the Chiricahua National Monument. *Id.* at 22a. That distant recreation area was accessible by taking I-191 to I-181, which would avoid having to make a "40-mile trip at least, through a dirt road." *Ibid.*
>
> (3) The minivan appeared to slow "appreciably" when it saw Stoddard's Border Patrol vehicle. *Id.* at 23a.
>
> (4) The minivan's trip coincided with the Border Patrol's shift change, when agents return to the checkpoint and leave the area open to smugglers. *Ibid.*
>
> (5) Smugglers were known to use minivans, and the Border Patrol had recently stopped a similar

minivan in the same area with a load of marijuana. *Id.* at 23a-24a.

(6) Respondent appeared nervous and his demeanor was consistent with illegal activity. *Id.* at 24a.

(7) Stoddard, having worked in the area, did not recognize the minivan as a local vehicle. *Ibid.*

(8) The position of the children's legs suggested that there was cargo on the rear floor of the minivan. *Id.* at 24a-25a.

(9) The children waved in a "methodical," "mechanical way" without looking at Stoddard, which "was a fact that is odd and would certainly lead a reasonable officer to wonder why are they doing this." *Id.* at 25a.

(10) The minivan was registered to "an often-used smuggling area." *Ibid.*

On the basis of those ten factors, collectively, the district court found that Stoddard had reasonable suspicion to stop the minivan. App., *infra*, 25a. The district court further found that respondent voluntarily consented to the search of his minivan, without any coercion by Stoddard. *Id.* at 25a-26a. The court concluded that respondent's consent extended to the duffel bags and, in any event, Stoddard had probable cause to search the bags after he smelled marijuana in the vehicle. *Id.* at 26a.

3. The court of appeals reversed.[4] The court of appeals recited established standards for determining whether reasonable suspicion exists, see App., *infra*, 8a-11a, but indicated concern that the "fact-specific weighing of circumstances" required by these standards "introduces a troubling degree of uncertainty and unpredictability into the process" of making reasonable suspicion determinations. *Id.* at 12a (quoting *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1142 (9th Cir.) (en banc) (Kozinski, J., concurring), cert. denied, 121 S. Ct. 211 (2000)). Accordingly, the court of appeals was of the view that "[w]hat factors law enforcement officers may consider in deciding to stop and question citizens minding their own business should, if possible, be carefully circumscribed and clearly articulated." *Id.* at 11a. To that end, the court stated that it intended to use this case "to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here." *Id.* at 12a.

Specifically, the court of appeals held that the district court had "improperly relied on" seven factors that were "neither relevant nor appropriate to a reasonable suspicion analysis in this case" and should not have been considered "as a matter of law." App., *infra*, 12a, 14a. *First*, "slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity" and cannot

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[4] The court of appeals issued its initial opinion on July 7, 2000. See App., *infra*, 1a. On December 1, 2000, the court revised its opinion and, based on the amended opinion, denied the government's petition for rehearing or rehearing en banc. *Id.* at 1a-20a. The changes made to the initial opinion are identified at pages 1a to 3a of the Appendix to this petition.

contribute to reasonable suspicion of unlawful activity. *Ibid.* *Second*, respondent's failure to acknowledge Stoddard as he drove by "provides no support for Stoddard's reasonable suspicion determination." *Id.* at 13a. *Third*, the children's "odd act" of waving to Stoddard without looking at him "carries no weight in the reasonable suspicion calculus." *Id.* at 13a-14a. *Fourth*, "[t]he fact that one minivan stopped in the past month on the same road contained marijuana is insufficient to taint all minivans with suspicion." *Id.* at 14a. *Fifth*, the officer's failure to recognize the minivan as a local vehicle "fails to contribute to the reasonable suspicion calculus" because "the area in question is one that is used for many purposes by different kinds of people." *Ibid.* *Sixth*, the fact that the minivan was "registered to an address in a block notorious for smuggling is also of no significance." *Id.* at 15a. *Seventh*, and finally, the appearance that there was cargo on the floor of a minivan that was carrying adults and children was "all too common to be of any relevance." *Id.* at 17a.

The court of appeals deemed only three factors relevant to its reasonable suspicion analysis: the road used by the minivan was sometimes used by smugglers; the minivan was traveling around the time of the Border Patrol's shift change; and, as a general matter, smugglers sometimes use minivans. App., *infra*, 17a. The court concluded that those three factors, considered in isolation from the other factors that the court had ruled were irrelevant, did not "constitute reasonable suspicion either singly or collectively." *Ibid.* The route taken by respondent, in the view of the court, "is of only moderate significance" because the road "is used for a number of entirely innocuous purposes." *Id.* at 17a-18a. The shift change, the court stated, "is of little

probative value" because the minivan tripped the first sensor approximately 45 minutes before the shift change. *Id.* at 18a. And minivans, the court concluded, "although sometimes used by smugglers, are among the best-selling family car models in the United States." *Ibid.*

Based on that analysis, the court of appeals held that the stop was unlawful. It then held that respondent's consent to Stoddard's search of the vehicle was tainted by the illegal stop. App., *infra*, 18a-19a. The court of appeals therefore reversed the district court's denial of respondent's motion to suppress evidence and remanded the case to the district court. *Id.* at 20a.

REASONS FOR GRANTING THE PETITION

The court of appeals has departed fundamentally from this Court's totality-of-the-circumstances test for determining whether reasonable suspicion exists. By declaring as a matter of law that law enforcement officers may not consider certain facts when forming a suspicion of illegal activity, the court of appeals has created a direct conflict with decisions of this Court and other courts of appeals, incorrectly excluded critical evidence in this case, and undermined effective law enforcement in the Ninth Circuit.

1. This Court's decisions leave no doubt that reasonable-suspicion analysis under the Fourth Amendment requires consideration of the totality of the circumstances surrounding an officer's decision to make a particular stop. Twice before, the Ninth Circuit has attempted to graft bright-line rules onto that necessarily fact-specific inquiry. Twice before, this Court has rejected the Ninth Circuit's approach.

a. In *United States* v. *Cortez*, 449 U.S. 411 (1981), this Court rejected the Ninth Circuit's view that rea-

sonable suspicion to stop a vehicle near the border requires "something * * * in the activities *of the person* being observed or in his surroundings that affirmatively suggests *particular* criminal activity," a test that led the court of appeals to invalidate a stop because the activity observed by Border Patrol agents was consistent with "innocent inferences." *United States* v. *Cortez*, 595 F.2d 505, 508 (9th Cir. 1979). In reversing that holding, and finding that reasonable suspicion existed in that case, the Court explained that "the essence" of the reasonable-suspicion test "is that the totality of the circumstances—the whole picture—must be taken into account." 449 U.S. at 417. The Court emphasized that all of the circumstances known to the officer must be considered, and those circumstances must be assessed in light of the "inferences and deductions" that a trained law enforcement officer properly may make. *Id.* at 418. The Court made clear that the question is not, as the Ninth Circuit had suggested, whether some specific fact "affirmatively suggests particular criminal activity," 595 F.2d at 508 (emphasis omitted), but "whether, based upon the whole picture, [the officer] could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity," 449 U.S. at 421-422.

Six years after *Cortez*, in *United States* v. *Sokolow*, 490 U.S. 1 (1989), the Court once again reviewed an attempt by the Ninth Circuit to narrow the totality-of-the-circumstances test. *Sokolow* involved a stop of an airline passenger at an airport, on suspicion of being a drug courier. See *id.* at 4-5. The district court denied a motion to suppress the drugs found by law enforcement agents, and the court of appeals reversed. *Id.* at 5-6. The court of appeals held that facts bearing on reasonable suspicion are appropriately divided into two

categories: "facts describing 'ongoing criminal activity,' such as the use of an alias or evasive movement through an airport," and "facts describing 'personal characteristics' of drug couriers, such as [a] cash payment for tickets, a short trip to a major source city for drugs, nervousness, type of attire, and unchecked luggage." *Id.* at 6 (quoting *United States* v. *Sokolow*, 831 F.2d 1413, 1419, 1420 (9th Cir. 1987)). In the court of appeals' view, facts in the second category are relevant to reasonable suspicion only if (1) they are accompanied by facts in the first category, and (2) the government shows "that the combination of facts at issue d[oes] not describe the behavior of 'significant numbers of innocent persons.'" *Ibid.* (quoting 831 F.2d at 1420).

This Court rejected the Ninth Circuit's effort to disaggregate and categorize the facts surrounding an officer's suspicion of illegal activity. "The concept of reasonable suspicion," the Court stated, "is not 'readily, or even usefully, reduced to a neat set of legal rules.'" 490 U.S. at 7 (quoting *Illinois* v. *Gates*, 462 U.S. 213, 232 (1983)). To the contrary, the Ninth Circuit's "effort to refine and elaborate the requirements of 'reasonable suspicion'" created "unnecessary difficulty" in applying the Fourth Amendment. *Id.* at 7-8. Under the proper analysis, a factor may support reasonable suspicion even though it is "quite consistent with innocent travel" if considered without reference to the surrounding facts. *Id.* at 9. Applying those principles, this Court reversed and held that the agents had sufficient grounds to stop the airline passenger. *Id.* at 8-11.

More recent decisions of this Court are to the same effect. In *Ornelas* v. *United States*, 517 U.S. 690 (1996), the Court reaffirmed that reasonable suspicion is a "fluid," "commonsense" concept that takes its substantive content from contextual application, not legal rules.

Id. at 695-696; see *id.* at 696 ("[e]ach case is to be decided on its own facts and circumstances") (internal quotation marks omitted). Because reasonable-suspicion analysis requires a court to analyze a "mosaic" of facts, one application of the standard will rarely control another. *Id.* at 698. Furthermore, the Court held, although reasonable-suspicion determinations are subject to de novo appellate review, a court of appeals should "give due weight to inferences drawn from th[e] facts by resident judges and local law enforcement officers." *Id.* at 699.

In *Illinois* v. *Wardlow*, 528 U.S. 119 (2000), the Court built on the same principle. In that case, which involved a stop of an individual who ran when he spotted police officers in a high-crime area, the Court once again considered whether lawful conduct that is "ambiguous and susceptible of an innocent explanation" can nevertheless contribute to reasonable suspicion. *Id.* at 125. The Court rejected the holding of the Illinois Supreme Court that some conduct must be considered innocent as a matter of law. See *id.* at 122-123. Instead, the Court reaffirmed that an officer may give weight to ambiguous conduct when making "commonsense judgments and inferences" about the likelihood that illegal activity is occurring. *Id.* at 125 (citing, *inter alia*, *Cortez*).

Notwithstanding this Court's repeated and consistent instruction, the Ninth Circuit has again held that the reasonable suspicion inquiry does not allow an investigating officer to consider all the circumstances known to him. By "attempt[ing] * * * to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops," App., *infra*, 12a, the court of appeals articulated precisely the sort of inflexible legal rules that are

neither useful nor permissible under the rubric of reasonable suspicion. See *Sokolow*, 490 U.S. at 7. By ruling that "some of the factors on which the district court relied are neither relevant nor appropriate to a reasonable-suspicion analysis in this case," App., *infra*, 12a, the court of appeals departed from the cardinal principle that reasonable-suspicion analysis requires a court to view "the whole picture" seen by the officer. *Cortez*, 449 U.S. at 417. And, by holding that some behavior, such as slowing down a vehicle upon seeing a law enforcement officer or carrying cargo in a family van, are too common and innocent *ever* to contribute to reasonable suspicion, App., *infra*, 12a, 16a-17a, the court of appeals violated the rule that typically innocent conduct may contribute to reasonable suspicion in light of the surrounding circumstances. See *Sokolow*, 490 U.S. at 8-10; *Wardlow*, 528 U.S. at 125.

The court of appeals also erred by substituting its own assessment of the facts for the inferences drawn by the officer on the scene and the local district court. For example, the district court agreed with Stoddard that the seemingly coached waving by the children in respondent's vehicle (which Stoddard demonstrated at the suppression hearing, see 12/7/98 Tr. 20) was suspicious; the court of appeals should have accorded that finding "due weight." *Ornelas*, 517 U.S. at 699, 700; see App., *infra*, 25a. Yet the court of appeals excluded that factor from its analysis without discussing the district court's finding. *Id.* at 13a-14a. Similarly, the federal judge sitting in the District of Arizona was well-positioned to determine, in light of "[t]he background facts," *Ornelas*, 517 U.S. at 700, that respondent's vehicle was not following a logical route to any established recreation area. App., *infra*, 22a. The court of appeals erroneously ignored that finding, and relied instead on

the general proposition that "the road in question is used for a number of entirely innocuous purposes." *Id.* at 17a-18a. Such disregard for the "inferences drawn from th[e] facts by resident judges and local law enforcement officers" directly contravenes this Court's holding in *Ornelas*, 517 U.S. at 699; see *ibid.* (noting that "[a] trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police officer views the facts through the lens of his police experience and expertise.").

b. The court of appeals' departure from the totality-of-the-circumstances approach, and its attempt to put certain fact patterns off-limits, has brought it into conflict with other courts of appeals. For instance, the Fifth Circuit and the Tenth Circuit, which share jurisdiction over Mexican border areas with the Ninth Circuit, both have held that a Border Patrol agent may give weight to a driver's reduction in speed upon seeing a Border Patrol vehicle.[5] The decision below, however, announces the contrary rule that "slowing down after spotting a law enforcement vehicle is * * * in no way indicative of criminal activity" and may not be considered. App., *infra*, 12a.

So too, the Fifth and Tenth Circuits have deemed it relevant that a Border Patrol agent did not recognize a

[5] See *United States* v. *Villalobos*, 161 F.3d 285, 291 (5th Cir. 1998) ("noticeable deceleration in the presence of a patrol car can contribute to reasonable suspicion"); *United States* v. *Barron-Cabrera*, 119 F.3d 1454, 1462 (10th Cir. 1997) (slowing to nearly 10 miles per hour below the speed limit supports reasonable suspicion); *United States* v. *Lopez-Martinez*, 25 F.3d 1481, 1486 (10th Cir. 1994) ("maintaining a noticeably slow speed in the presence of a police officer may suggest nervousness" and support reasonable suspicion).

vehicle as being local. See *United States* v. *Zapata-Ibarra*, 212 F.3d 877, 883 (5th Cir.), cert. denied, 121 S. Ct. 412 (2000); *United States* v. *Ceniceros*, 204 F.3d 581, 583-585 (5th Cir. 2000); *United States* v. *Gonzalez*, 190 F.3d 668, 672 (5th Cir. 1999); *United States* v. *Villalobos*, 161 F.3d 285, 291 (5th Cir. 1998); *United States* v. *Leyba*, 627 F.2d 1059, 1063-1064 (10th Cir. 1980). The Ninth Circuit, by contrast, dismissed Stoddard's failure to recognize respondent's minivan as entirely irrelevant, because (as will almost always be the case) outsiders sometimes have legitimate reasons to come into the area where the stop occurred. App., *infra*, 14a.

It also is well-established that the apparent presence of a substantial amount of cargo in a vehicle can support a Border Patrol agent's reasonable suspicion of illegal smuggling activity. See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975); *United States* v. *Guerrero-Barajas*, 240 F.3d 428, 433 (5th Cir. 2001); *United States* v. *Cruz-Hernandez*, 62 F.3d 1353, 1355 (11th Cir. 1995); *United States* v. *Lopez-Martinez*, 25 F.3d 1481, 1483-1484 (10th Cir. 1994); *United States* v. *Anderson*, 923 F.2d 450, 457 (6th Cir.), cert. denied, 499 U.S. 980 and 500 U.S. 936 (1991). The court of appeals nevertheless deemed that factor wholly irrelevant, stating that a minivan carrying adults and children presents "an entirely different situation." App., *infra*, 16a-17a. The court's minivan exception ignores that smugglers have been known to use minivans, *id.* at 17a, and there is no suggestion in the record that smugglers never carry children. The presence of cargo, while not

in itself criminal, must be assessed in light of all the facts known to the officer.[6]

Although those multiple conflicts between the Ninth Circuit's decision in this case and the holdings of sister circuits warrant resolution by this Court, the critical point is that such conflicts are the inevitable result of the Ninth Circuit's attempt to exclude whole categories of facts from the reasonable suspicion inquiry. Correcting the Ninth Circuit's fundamental analytic error is the appropriate way to resolve the specific conflicts described above, and to prevent the development of related conflicts as the Ninth Circuit applies its incorrect approach to other fact patterns.

2. Because of its methodological errors, the court of appeals reached the wrong result in this case. The court of appeals never purported to consider "the whole picture" seen by Agent Stoddard. *Cortez*, 449 U.S. at 417. As discussed above, the court of appeals improperly excluded from its analysis numerous relevant considerations, such as respondent's dramatic reduction in speed upon seeing a Border Patrol vehicle, respondent's visible nervousness,[7] the children's unnatural

[6] Unlike the court of appeals, the district court considered Stoddard's observation that the minivan appeared to have cargo in light of all the facts known to Stoddard. App., *infra*, 25a ("Could have been camping equipment, I suppose, had not all the other facts been there pointing to the possibility of illegal activity.").

[7] The court of appeals characterized the evidence about respondent's nervous demeanor as a involving a mere "failure to acknowledge Agent Stoddard." App., *infra*, 13a. Stoddard actually testified that respondent "became stiff and rigid" and appeared nervous when he passed the Border Patrol vehicle. 12/7/98 Tr. 17-18, 42-43. The district court found Stoddard's testimony credible. App., *infra*, 24a, 26a-27a. And apparent nervousness indisputably was relevant to the reasonable suspicion analysis. See *Wardlow*, 528 U.S. at 124 ("[N]ervous, evasive behavior is a pertinent factor

waving, the registration of the minivan to a non-local address that is very close to the Mexican border and on a street that is used as a staging area for smuggling, and indications that there was bulky cargo on the floor of the minivan. The court of appeals also overlooked the district court's finding that respondent was not headed toward nearby recreation areas and was not following a sensible route to recreation areas farther north. App., *infra*, 22a. That finding, considered together with Stoddard's failure to recognize the minivan as being local traffic, see *id.* at 24a, left no obvious explanation for respondent's appearance on the dirt roads of a sparsely populated area—except that respondent was following a "notorious" smuggling route to avoid the I-191 checkpoint. 12/7/98 Tr. 15.

The court of appeals likewise erred in attaching "little probative value" to the fact that respondent's minivan triggered the first sensor on Leslie Canyon Road 45 minutes before the Border Patrol's scheduled shift change. App., *infra*, 18a. The court of appeals reasoned that the fact that there would be a shift

in determining reasonable suspicion."); *United States* v. *Sowers*, 136 F.3d 24, 27 (1st Cir.) (nervousness following traffic stop), cert. denied, 525 U.S. 841 (1998); *United States* v. *Massie*, 65 F.3d 843, 849 (10th Cir. 1995) (nervousness at border checkpoint); *Cruz-Hernandez*, 62 F.3d at 1356 n.2 ("A driver who glances 'repeatedly and nervously' at a border patrol agent as the driver passes * * * gives the agent cause to consider the behavior suspicious."); *United States* v. *Bloomfield*, 40 F.3d 910, 919 n.10 (8th Cir. 1994) (en banc) ("[W]e have often held that nervousness and other 'subjective perceptions' [of law enforcement officers] are valid factors supporting reasonable suspicion."), cert. denied, 514 U.S. 1113 (1995); *United States* v. *McCarthur*, 6 F.3d 1270, 1278 (7th Cir. 1993) (train passenger's nervousness and shaky hands); *United States* v. *Glover*, 957 F.2d 1004, 1010 (2d Cir. 1992) (sweating and nervous looking-around upon exiting bus).

change in 45 minutes did not "add much to the mix." *Ibid.* But that reasoning ignored the time it takes agents to drive back to the checkpoint for a shift change. Consistent with Agent Stoddard's testimony, see 12/7/98 Tr. 11, 31, the district court found that the sensor was triggered at approximately the same time that "agents are returning to the checkpoint [for the 3 p.m. shift change,] leaving this area open" to smugglers. App., *infra*, 23a.

The question before the court of appeals was not whether the facts known to Stoddard when he stopped the minivan constituted probable cause for an arrest or a search (they would not have), or whether the factors *individually* supported reasonable suspicion or were flatly inconsistent with innocent travel, see *Wardlow*, 528 U.S. at 125. The question, instead, was whether the totality of the circumstances identified by Stoddard and the district court justified a brief stop of the vehicle to investigate. They did.

3. Correcting the court of appeals' erroneous narrowing of the reasonable-suspicion inquiry is a matter of great importance to law enforcement, and particularly to the national effort to halt smuggling and transportation of illegal aliens away from border areas.

This Court has recognized "the enormous difficulties of patrolling a 2,000-mile open border and the patient skills needed by those charged with halting illegal entry into this country." *Cortez*, 449 U.S. at 418-419. We are advised by the Immigration and Naturalization Service that in Fiscal Year 2000, federal agents conducted nearly 438 million inspections along the land borders

with Canada and Mexico, and there were more than 1.6 million apprehensions by the Border Patrol.[8]

Because the Border Patrol lacks constitutional authority to conduct random searches of vehicles that may be carrying illegal aliens or narcotics from border areas into the interior of the country, it must rely heavily upon its powers to inspect vehicles at fixed checkpoints in the vicinity of the border, and to make those checkpoints effective by stopping suspicious vehicles that circumvent them. See *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 268, 272-273 (1973). If facts that suggest smuggling activity to a trained officer under the particular circumstances can be disaggregated and individually dismissed as they have been in this case, then the Border Patrol's ability to prevent smuggling and evasion of its checkpoints will be greatly compromised.

The court of appeals' approach, moreover, will undermine, rather than further, the court's stated objective of reducing the "uncertainty and unpredictability" associated with application of the reasonable-suspicion standard in all areas of law enforcement. App., *infra*, 12a (internal quotation marks omitted).[9] As this Court

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[8] Two-thirds of the Border Patrol's apprehensions occurred within the Ninth Circuit. At its southern edge, the Ninth Circuit contains the busiest border crossing in the world (at San Diego, where 125,000 people cross every day). At its northern edge, it contains the border in Washington State, which logged 5.5 million recorded crossings in 1999.

[9] The court of appeals' parsing of the reasonable suspicion analysis into a series of hurdles that law enforcement must separately surmount is not an aberration, and it is not limited to the border context. In several decisions since *Sokolow*, the Ninth Circuit, using the same approach, has eliminated factors from consideration in the reasonable suspicion analysis as a matter of

has held, "neat * * * legal rules * * * create[] unnecessary difficulty" in applying reasonable-suspicion analysis. *Sokolow*, 490 U.S. at 7. Confirming the validity of that conclusion, the rules articulated by the court of appeals in this case prevent law enforcement officers from relying on their own assessments of the circumstances before them, as seen through the lens of their training and experience. Whenever a fact observed by an officer already has been found irrelevant as a matter of law under the Ninth Circuit's approach, the officer must attempt to exclude the fact from his or her split-second assessment of the situation, and is left to speculate about what degree of suspicion would exist in the absence of the forbidden fact. Officers must also attempt to anticipate whether other factors they deem significant under the totality of the circumstances might fail an ill-defined standard of "sufficient" relevance when isolated from the surrounding facts. The court of appeals' approach thus requires officers to ignore facts that, based on their training and experience, contribute to reasonable suspicion. The appellate court's substitution of "library analysis" for "commonsense conclusions * * * by those versed in

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law. See *Gonzalez-Rivera* v. *INS*, 22 F.3d 1441, 1446 (1994) ("[A] driver's failure to look at the Border Patrol cannot weigh in the balance of whether there existed reasonable suspicion for a stop."); *United States* v. *Thomas*, 211 F.3d 1186, 1191 (2000) (marijuana bales cannot make a distinctive sound when thrown); *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1131-1136 (en banc) (individual's Hispanic appearance and looking at a law enforcement vehicle in a rear view mirror may not be considered), cert. denied, 121 S. Ct. 211 (2000). This case, however, is unique inasmuch as the court of appeals expressly sought to provide law enforcement officers with guidance that would apply under the full range of circumstances. See App., *infra*, 11a-12a.

the field of law enforcement," *Cortez*, 449 U.S. at 418, defies sound logic as well as this Court's decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-10229
D.C. No. CR-98-00157-FRZ

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RALPH ARVIZU, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Arizona
FRANK R. ZAPATA, District Judge, Presiding

Argued and Submitted
March 15, 2000—San Francisco, California

[Filed July 7, 2000
Amended December 1, 2000]

ORDER

Before: HENRY A. POLITZ,[1] STEPHEN REINHARDT, and MICHAEL DALY HAWKINS, Circuit Judges.

Opinion by Judge Reinhardt

* * * * *

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[1] The Honorable Henry A. Politz, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

The Opinion filed July 7, 2000 is amended as follows:

1. Slip op. page 7483, immediately following the first full paragraph, insert the following paragraph:

> "'What factors law enforcement officers may consider in deciding to stop and question citizens minding their own business should, if possible, be carefully circumscribed and clearly articulated. When courts invoke multi-factor tests, balancing of interests or fact-specific weighing of circumstances, this introduces a troubling degree of uncertainty and unpredictability into the process; no one can be sure whether a particular combination of factors will justify a stop until a court has ruled on it.' *Montero-Camargo*, 208 F.3d at 1142 (Kozinski, J. concurring). Thus we attempt here to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here."

2. Slip op. page 7483, in the sentence beginning "In reaching our conclusion" at the beginning of the second full paragraph, add the words "in this case" after the words "are neither relevant nor appropriate to a reasonable suspicion analysis . . . ."

3. Slip op. page 7485, in the second full paragraph, delete the first sentence which begins "As we have previously held," and replace it with the following:

> "As we have previously held, 'factors that have such a low probative value that no reasonable officer would have relied on them to make an investigative stop must be disregarded as a matter of law.'

> *Montero-Camargo*, 208 F.3d at 1132 (citation omitted)."

4. Slip op. page 7485, in the second full paragraph, in the sentence beginning "An examination of four additional factors," replace the words "too fall in this category" with the words "have little or no weight under the circumstances."

5. Slip op. page 7488, in the first sentence, add the words "in this case" after the words "are *not* relevant . . . ."

With those amendments, the panel has voted unanimously to deny the Petition for Rehearing; Judges Reinhardt and Hawkins have voted to deny the Petition for Rehearing En Banc, and Judge Politz has so recommended. The full court was advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote on that petition. Fed. R. App. P. 35.

The Petition for Rehearing and Petition for Rehearing En Banc are DENIED.

OPINION

REINHARDT, Circuit Judge:

Ralph Arvizu appeals from the district court's denial of his motion to suppress marijuana found in his van by a border patrol agent. Arvizu raises two issues before this court: first, whether the stop of his van by a Border Patrol agent was justified by reasonable suspicion; and second, whether he validly consented to the subsequent search of his van. Because the district court erred in finding that the stop was justified by reasonable suspicion, we reverse.

1. ***Factual Background***

The events in question took place on the afternoon of January 19, 1998 on Leslie Canyon Road near Douglas, Arizona. Leslie Canyon Road is a largely unpaved, flat, and well-maintained road in the Coronado National Forest that parallels Highway 191. The road, which runs north south, begins at Highway 80 and ends at Rucker Canyon Road. Although Border Patrol Agent Stoddard asserted that the road is rarely travelled by anyone other than ranchers and forest service personnel and is "very desolate," at its southern end, it is paved for about ten miles, and there are residences on both sides.[2] Moreover, there is a national forest in the area, as well as the Chiricahua National Monument, both of which attract a number of visitors. There are also campgrounds and picnic areas around Rucker Canyon.[3] An investigator for the defense who had lived in Douglas for four years testified that people who live in Douglas frequently use the area for recreation. There are also a number of communities in the area, and for those heading towards the ones that are situated along the roadway between 191 and 186 from Douglas, driving along Leslie Canyon Road is shorter than driving out to I-191 and driving north.

The Douglas, Arizona border station is located about 30 miles from the border on the highway at the intersection of I-191 and Rucker Canyon Road. The station is not operational every day of the year, although on

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[2] There are also homes around the nearby Hunt Canyon, "all along" Highway 191 and along the road leading to the Chiricahua National Monument. The community of Sunizona, with schools and homes, is also on I-191.

[3] In particular, there is a Boy Scouts camp around Rucker Canyon, and a number of people use the area for biking.

January 19 it was. On that occasion, Border Patrol Agent Stoddard was working at the Douglas station.[4] At about 2:15 p.m. that afternoon, a sensor alerted him to the fact that a car was travelling north on Leslie Canyon Road.[5] Stoddard testified that this made him suspicious for three reasons: first, the timing—the car passed by around 2 p.m. and officers change shifts at 3 p.m. According to Officer Stoddard, smugglers often try to synchronize their movements with shift changes.[6] Second, cars travelling north sometimes use the surrounding, unpaved roads to bypass the station. Third, another officer had stopped a minivan heading north on that road a month earlier and had found marijuana.

His curiosity piqued, Stoddard drove east on Rucker Canyon Road to intersect with Leslie Canyon Road. As he drove, he received another report of sensor activity, indicating that the vehicle was heading west on Rucker from Leslie Canyon. After Stoddard passed Kuykendall Road, he noticed a Toyota minivan approaching him in a cloud of dust. Stoddard proceeded to pull over to the side of the road to observe the minivan as it approached. Although he did not have a radar gun,

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[4] At the suppression hearing, Stoddard testified that he had been assigned to the Douglas station for over two years. He estimated that he found illegal aliens in approximately 50 stops made while he was on roving patrol during those years. On cross-examination, however, he admitted that he had never made any drug-related stops in the area.

[5] On cross-examination, Stoddard estimated that the sensors went off at least four times in each eight-hour shift. In other words, according to Stoddard, approximately 4380 cars pass by every year. The roughly 50 stops in which Agent Stoddard was involved over a period of two years and in which some violation of the law were found represent approximately 1% of this number.

[6] At that time, there were three shift changes a day.

the agent guessed that the van was travelling at 50 to 55 miles per hour when he first spotted it. According to Stoddard, the minivan slowed as it neared his car. In the minivan was Ralph Arvizu, accompanied by his sister, Julie Reyes, and her three children—Julisa, Renato, and Guillermo.

As the Toyota passed, Stoddard observed the two adults in the front, and three children in the back. According to Stoddard, the driver appeared rigid and nervous. Stoddard based this conclusion on the fact that Arvizu had stiff posture, kept both hands on the steering wheel, and did not acknowledge him. According to Stoddard, this was unusual because drivers in the area habitually "give us a friendly wave." Stoddard also noticed that the knees of the two children sitting in the very back seat were higher than normal, as if their feet were resting on some object placed below the seat.

As the minivan passed, Stoddard decided to follow it. As he did, the children began to wave. According to Stoddard, this seemed odd because the children did not turn around to wave at him; rather, they sat in their seats and continued to face forward. The "waving" continued off and on for about four to five minutes. Based on this, Stoddard believed that the children had been instructed to wave at him by the adults in the front seat.

As the two cars approached the intersection with Kuykendall Road, Stoddard noticed that the Toyota's right turn signal was flashing. It was turned off briefly, but was turned on again shortly before the intersection. The Toyota then turned on to Kuykendall, an action which Stoddard also found suspicious because Kuykendall was the last road a car would take to avoid the border station on Highway 191. (Stoddard also found it

suspicious that he did not recognize the vehicle in question, although he conceded that tourists visited the area to see the forest and national monument.)

At this point, Stoddard ran a vehicle registration check and discovered that the van's license plates were valid, and that the car was registered to Leticia Arvizu at 403 4th Street in Douglas, Arizona. At the suppression hearing, Stoddard testified that the neighborhood in which 403 4th Street was located was "one of the most notorious areas" for drug and alien smuggling.[7] On cross-examination, Stoddard conceded that he had no information about smuggling activities either at 403 4th Street in particular or on the part of Leticia Arvizu, in whose name the minivan was registered.

At this point, Stoddard decided to stop the van. As he approached the driver's side, he noticed that there was something underneath the children's feet. As Stoddard approached the Toyota, Arvizu leaned out the window and said "Good morning, officer. How are you doing?" According to Stoddard, Arvizu appeared nervous, and did not remember the name of the park to which he was driving. When Stoddard asked Arvizu about his citizenship, Arvizu replied that he was in fact an American citizen, as were all of the minivan's occupants. When Stoddard asked if Arvizu had anything or anyone hidden in the van, Arvizu said no. Nevertheless, Stoddard asked if he could look around the van, a request which Arvizu said he interpreted as a request to look around the outside of the vehicle, not to look inside. (At the suppression hearing, both Arvizu and his

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[7] On cross-examination, Stoddard explained that the "general area" was one in which aliens were often stashed before being transported north.

sister testified that Stoddard had his hand on his gun when he approached the vehicle and asked to look around. Stoddard denied this.) Stoddard did not tell Arvizu that he had a right to refuse, nor did he read Arvizu his *Miranda* rights. When Arvizu agreed to let Stoddard look around, the agent walked around to the passenger's side and opened the sliding door. Stoddard testified that as he did so, he saw a black duffel bag and smelled marijuana. Stoddard proceeded to open the bag and discovered marijuana inside.

Arvizu was charged with possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1). At a suppression hearing, Arvizu argued first, that Stoddard did not have reasonable suspicion to stop the minivan, and second, that he did not give voluntary consent to the search of his van. The district court rejected both arguments and denied the motion to suppress. Arvizu then entered a conditional guilty plea, under which he reserved the right to appeal the denial of his motion to suppress. This appeal followed.

2. *Legal Background*

In order to satisfy the Fourth Amendment's strictures, an investigatory stop may be made only if the officer in question has "a reasonable suspicion supported by articulable facts that criminal activity may be afoot . . . ." *United States* v. *Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L.Ed.2d 1 (1989) (internal quotation omitted) (citing *Terry* v. *Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968)). In determining whether reasonable suspicion exists, we must take into account the totality of the circumstances. *Sokolow*, 490 U.S. at 7-8, 109 S. Ct. 1581 (quoting *Illinois* v. *Gates*, 462 U.S. 213, 232, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983)). At the same time, however, factors that have so little pro-

bative value that no reasonable officer would rely on them in deciding to make an investigative stop must be disregarded. *Gonzalez-Rivera* v. *INS*, 22 F.3d 1441, 1446 (9th Cir. 1994).

Although the level of suspicion required for a brief investigatory stop is less demanding than that required to establish probable cause, the Fourth Amendment requires an objective justification for such a stop. *Sokolow*, 490 U.S. at 7, 109 S. Ct. 1581. Thus, the Supreme Court has held that reasonable suspicion does not exist where an officer can articulate only "an 'inchoate and unparticularized suspicion or 'hunch' of criminal activity.'" *Illinois* v. *Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L.Ed.2d 570 (2000). Rather, reasonable suspicion exists only when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for *particularized* suspicion.[8] *United States* v.

[8] In *Brignoni-Ponce*, the Court listed factors which officers might permissibly take into account in deciding whether reasonable suspicion exists to stop a car. Those factors include: (1) the characteristics of the area in which they encounter a vehicle; (2) the vehicle's proximity to the border; (3) patterns of traffic on the particular road and information about previous illegal border crossings in the area; (4) whether a certain kind of car is frequently used to transport contraband or concealed aliens; (5) the driver's "erratic behavior or obvious attempts to evade officers;" and (6) a heavily loaded car or an unusual number of passengers. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884-885, 95 S. Ct. 2574, 45 L.Ed.2d 607 (1975). We note, however, that reasonable suspicion is not a numbers game. Different factors have varying levels of significance, depending on their context. *See Montero-Camargo*, 208 F.3d at 1130, n.12; *see also Sokolow*, 490 U.S. at 10, 109 S. Ct. 1581. Thus, where a stop is based upon a number of factors, each of which carries only minimal probative weight, quantity does not necessarily make up for the lack of quality.

Cortez, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L.Ed.2d 621 (1981); *United States* v. *Salinas*, 940 F.2d 392, 394 (9th Cir. 1991). In turn, particularized suspicion means a reasonable suspicion that *the particular person being stopped* has committed, or is about to commit, a crime. *Cortez*, 449 U.S. at 418, 101 S. Ct. 690.

At times, conduct that may be entirely innocuous when viewed in isolation may nevertheless properly be considered in determining whether or not reasonable suspicion exists. *Sokolow*, 490 U.S. 1, 10, 109 S. Ct. 1581 (citations and footnotes omitted) (citing *Illinois* v. *Gates*, 462 U.S. 213, 243-44, n.13, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983)). Put another way, "conduct that is not necessarily indicative of criminal activity may, in certain circumstances, be relevant to the reasonable suspicion calculus." *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1130 (9th Cir. 2000) (en banc); *Wardlow*, 528 U.S. at 125, 120 S. Ct. at 677. At the same time, innocuous conduct does *not* justify an investigatory stop unless other information or surrounding circumstances of which the police are aware, considered together with the otherwise innocent conduct, provides sufficient reason to suspect that criminal activity either has occurred or is about to take place. *Guam* v. *Ichiyasu*, 838 F.2d 353, 355 (9th Cir. 1988).

In all circumstances, law enforcement officials are entitled to assess the facts in light of their experience. *Brignoni-Ponce*, 422 U.S. at 885, 95 S. Ct. 2574. Nevertheless, "[w]hile an officer may evaluate the facts supporting reasonable suspicion in light of his experience, experience may not be used to give the officers unbridled discretion in making a stop." *Nicacio* v. *INS*, 797 F.2d 700, 705 (9th Cir. 1986), *overruled in part on other grounds in Hodgers-Durgin* v. *De La Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999); *see also United States* v. *Jimenez-Medina*, 173 F.3d 752, 754 (9th Cir. 1999). Thus, while an officer's experience may furnish the background against which the relevant facts are to be assessed as long as the inferences he draws are objectively reasonable, *Cortez*, 449 U.S. at 418, 101 S. Ct. 690, experience is not an independent factor in the reasonable suspicion analysis. *Montero-Camargo*, 208 F.3d at 1131-32.

3. *Analysis*

In finding that the stop by Agent Stoddard was justified by reasonable suspicion, the district court relied on the following list of factors: 1) smugglers used the road in question to avoid the border patrol station; 2) Arvizu drove by within an hour of a Border Patrol shift change; 3) a minivan stopped on the same road a month earlier contained drugs; 4) minivans are among the types of vehicles commonly used by smugglers; 5) the minivan slowed as it approached the Border Patrol vehicle; 6) Arvizu appeared rigid and stiff, and did not acknowledge the officer; 7) the officer did not recognize the minivan as a local car; 8) the children's knees were raised, as if their feet were resting on something on the floor of the van; 9) the children waved for several minutes but not towards the officer; and 10) the van was registered to an address in a neighborhood notorious for smuggling. Based on these factors, the district court concluded that reasonable suspicion did exist. We disagree.

"What factors law enforcement officers may consider in deciding to stop and question citizens minding their own business should, if possible, be carefully circumscribed and clearly articulated. When courts invoke

multi-factor tests, balancing of interests or fact-specific weighing of circumstances, this introduces a troubling degree of uncertainty and unpredictability into the process; no one can be sure whether a particular combination of factors will justify a stop until a court has ruled on it." *Montero-Camargo*, 208 F.3d at 1142 (Kozinski, J. concurring). Thus we attempt here to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here.

In reaching our conclusion, we find that some of the factors on which the district court relied are neither relevant nor appropriate to a reasonable suspicion analysis in this case, and that the others, singly and collectively, are insufficient to give rise to reasonable suspicion. We begin by considering the factors the district court improperly relied on, before turning to those which it properly took into account.

One of the factors on which the district court relied—namely, the fact that the minivan slowed as it approached the Border Patrol vehicle—is squarely prohibited by our precedent. *United States* v. *Montero-Camargo*, 208 F.3d at 1136; *United States* v. *Garcia-Camacho*, 53 F.3d 244, 247 (9th Cir. 1995). We note that Agent Stoddard never claimed that Arvizu broke any traffic laws. Nor, for that matter, did he assert that Arvizu drove erratically or evasively. Rather, Arvizu simply slowed down. As we have previously noted, slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity. *Id.* at 247; *United States* v. *Hernandez-Alvarado*, 891 F.2d 1414, 1419 (9th Cir. 1989).

A second factor relied on by the district court, Arvizu's failure to acknowledge Agent Stoddard, is of "questionable value . . . generally"[9] and carries weight, if at all, only under special circumstances. *See Hernandez-Alvarado*, 891 F.2d at 1419 n.6 ("avoidance of eye contact has been deemed an inappropriate factor to consider unless special circumstances make innocent avoidance of eye contact improbable") (internal quotations omitted). As we have held previously, a failure to acknowledge a law enforcement officer by look or gesture, while possibly indicating a lack of neighborliness, ordinarily does not provide a basis for suspecting criminal activity. *Garcia-Camacho*, 53 F.3d at 247; *Gonzalez-Rivera*, 22 F.3d at 1446. Although we have held that the lack of eye contact may be considered under *some* circumstances, we have always treated that factor with appropriate "skepticism" because "reliance upon 'suspicious' looks [or, as the case may be, the failure to look] can . . . easily devolve into a case of damned if you do, equally damned if you don't." *Montero-Camargo*, 208 F.3d at 1136; *see also Gonzalez-Rivera*, 22 F.3d at 1446-47; *Nicacio*, 797 F.2d at 704; *United States* v. *Mallides*, 473 F.2d 859, 861 n.4 (9th Cir. 1973) (collecting cases). Because no "special circumstances" rendered "innocent avoidance . . . improbable," Arvizu's failure to acknowledge Stoddard's presence by waving, or by indicating some other form of recognition, *Hernandez-Alvarado*, 891 F.2d at 1419 n.6, provides no support for Stoddard's reasonable suspicion determination.

For similar reasons, we find that the children's conduct carries no weight in the reasonable suspicion

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[9] *Montero-Camargo*, 208 F.3d at 1136 (quoting *United States* v. *Munoz*, 604 F.2d 1160, 1160 (9th Cir. 1979) (per Kennedy, J.)).

calculus. If every odd act engaged in by one's children while sitting in the back seat of the family vehicle could contribute to a finding of reasonable suspicion, the vast majority of American parents might be stopped regularly within a block of their homes. More to the point, if a driver's failure to wave at an officer provides no support for a determination to stop a vehicle, it would be incongruous to say that the vehicle could be stopped because children who were passengers in the car did wave. *See, e.g., Garcia-Camacho*, 53 F.3d at 247.

As we have previously held, "factors that have such a low probative value that no reasonable officer would have relied on them to make an investigative stop must be disregarded as a matter of law." *Montero-Camargo*, 208 F.3d at 1132 (citation omitted). An examination of four additional factors—namely, the third, seventh, eighth, and tenth—demonstrate that they have little or no weight under the circumstances. The fact that one minivan stopped in the past month on the same road contained marijuana is insufficient to taint all minivans with suspicion. (In contrast, as we discuss below, evidence that in the Border Patrol's experience, minivans are sometimes used by smugglers may be of *some* probative value, because the inference arises from more than a single, isolated incident.)

The fact that the officer did not recognize the minivan as belonging to a local resident also fails to contribute to the reasonable suspicion calculus. Evidence introduced at the suppression hearing made it clear that the area in question is one that is used for many purposes by different kinds of people—local residents use the roads as a shortcut, while both residents and tourists alike camp, hike, bike, picnic, and visit the local forest and national monument. Accordingly, it is hardly

surprising that a Border Patrol agent would not recognize every passing car.

Similarly, the fact that a van is registered to an address in a block notorious for smuggling is also of no significance and may not be given any weight. *See United States* v. *Jimenez-Medina*, 173 F.3d 752, 755 (9th Cir. 1999) (holding that "coming from the wrong neighborhood" does not give rise to reasonable suspicion). In arriving at this conclusion, we first consider the cases which involve an individual's presence in a high crime area. The rule that controls such cases is that presence in a high crime area is not enough in and of itself to give rise to reasonable suspicion, *Brown* v. *Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 61 L.Ed.2d 357 (1979), but "officers are not required to ignore the relevant characteristics of a location" when an individual's conduct, if considered in the context of that location, gives rise to reasonable suspicion that a crime has been or is being committed. *Wardlow*, 528 U.S. at 124, 120 S. Ct. at 676 (quoting *Adams* v. *Williams*, 407 U.S. 143, 144, 147-48, 92 S. Ct. 1921, 32 L.Ed.2d 612 (1972)). In contrast, where a person lives is an entirely different matter, and one's place of residence is simply not relevant to a determination of reasonable suspicion. Otherwise, persons forced to reside in high crime areas for economic reasons (who are frequently members of minority groups) would be compelled to assume a greater risk not only of becoming the victims of crimes but also of being victimized by the state's efforts to prevent those crimes—because their constitutional protections against unreasonable intrusions would be significantly reduced.

Moreover, in *Montero-Camargo*, we cautioned that "courts should examine with care the specific data

underlying" the assertion that an area is one in which "particular crimes occur with unusual regularity."[10] *Montero-Camargo*, 208 F.3d at 1138. In this case, the data simply does not withstand that scrutiny. The only evidence in the record to support the "high crime" characterization is Stoddard's assertion that the 400 block was "one of the most notorious areas" for drug and alien smuggling. Agent Stoddard did not explain the factual basis for this assertion, nor did he identify the source of his information. For this reason as well, we conclude that the district court's reliance on this factor was misplaced. *See Montero-Camargo*, 208 F.3d at 1143 (Kozinski, J., concurring in the result) (noting that "[j]ust as a man with a hammer sees every problem as a nail, so a man with a badge may see every corner of his beat as a high crime area").

Finally, we note that the fact that the children's knees were raised, while consistent with the placement of their feet on packages of illicit substances, is equally (if not more) consistent with the resting of their feet on a cooler, picnic basket, camping gear, or suitcase. In determining whether reasonable suspicion exists, we have considered whether a car appears heavily loaded. *Garcia-Camacho*, 53 F.3d at 245-46; *United States* v. *Franco-Munoz*, 952 F.2d 1055, 1057 (9th Cir. 1991), *overruled in part on other grounds by Montero-Camargo*, 208 F.3d at 1134, n.22; *United States* v. *Bugarin-Casas*, 484 F.2d 853 (9th Cir. 1973). We have done so where the vehicle was riding low or responded sluggishly to bumps. *Garcia-Camacho*, 53 F.3d at 245;

[10] As we noted in that case, our citing of the area where the stop took place as a "high crime area" was conditioned on the unique circumstances of the area—an isolated, uninhabited locale not used for any legitimate purpose.

Franco-Munoz, 952 F.2d at 1057. In general, however, we have not given that factor much weight, absent other circumstances that warrant attributing particular significance to it. *Garcia-Camacho*, 53 F.3d at 249 (finding the fact that a truck with two passengers and a camper appeared heavily laden to be of little weight); *United States* v. *Rodriguez*, 976 F.2d 592, 596 (9th Cir. 1992). In this case, moreover, we are faced with an entirely different situation, in which Officer Stoddard first inferred from the fact that the children's knees were raised that their feet were resting on some sort of object. From this, he next inferred that whatever the children were using as a footrest might well be contraband. That a family travelling in a minivan might put objects on the floor of the van and that children might use those objects as a footrest does not seem at all odd to us. In short, we find this factor also to be all too common to be of any relevance.

Having considered those factors that are *not* relevant in this case, we must now turn to those that are —namely, that the road was sometimes used by smugglers, that Arvizu was driving on the road near the time that the Border Patrol shift changed, and that he was driving a minivan, a type of car sometimes used by smugglers. Although these factors are indeed both legitimate and probative to *some* degree, *see, e.g.*, *Franco-Munoz*, 952 F.2d at 1057, they are not enough to constitute reasonable suspicion either singly or collectively. *Jimenez-Medina*, 173 F.3d at 752-56; *Rodriguez*, 976 F.2d at 594-96; *Hernandez-Alvarado*, 891 F.2d at 1419-19; *Garcia-Camacho*, 53 F.3d at 247-49.

As the testimony at the suppression hearing made clear, the road in question is used for a number of en-

tirely innocuous purposes—including as a way of getting to camping grounds and recreational areas, and as a shortcut when travelling from one community to another. Thus, the fact that Arvizu's car was using the road is of only moderate significance. Similarly, minivans, although sometimes used by smugglers, are among the best-selling family car models in the United States. Thus, although, under the applicable case law, the make of the car may be of *some* relevance in determining whether reasonable suspicion exists, it does not carry particular weight here. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885, 95 S. Ct. 2574, 45 L.Ed.2d 607 (1975); *United States* v. *Garcia-Barron*, 116 F.3d 1305, 1307 (9th Cir. 1997); *Bugarin-Casas*, 484 F.2d at 855. We also find that the time at which Arvizu drove by the sensors on Leslie Canyon Road, although relevant, *Franco-Munoz*, 952 F.2d at 1057, is of little probative value, especially in the absence of other factors that tend more persuasively to demonstrate evasive behavior. *Jimenez-Medina*, 173 F.3d at 754-55. In this case, Arvizu's car passed by the sensors at around 2:15 p.m., approximately 45 minutes before the scheduled shift change. While it makes sense to us that smugglers might wish to take advantage of shift changes, a car's travelling on a road in the general area of a Border Patrol station three quarters of an hour before the actual shift change does not seem to us to add much to the mix.

Given the above analysis, we hold that the stop by Agent Stoddard was not supported by reasonable suspicion. The next question, then, is whether the illegality of the stop taints the evidence as a result of the search that ensued. We hold that it does.

Under the Fourth Amendment, an illegal stop taints all evidence obtained pursuant to the stop, unless the taint is purged by subsequent events. *United States* v. *Morales*, 972 F.2d 1007, 1010 (9th Cir. 1992); *United States* v. *Delgadillo-Velasquez*, 856 F.2d 1292, 1299 (9th Cir. 1988). Accordingly, in *Florida* v. *Royer*, 460 U.S. 491, 508, 103 S. Ct. 1319, 75 L.Ed.2d 229 (1983), the Supreme Court suppressed the evidence discovered as a result of a search following an illegal stop, even though the police obtained the defendant's consent to the search, because the illegal stop tainted the subsequent consent.[11]

In determining whether the taint of an illegal stop has been purged, "[t]he question we must ask is whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *United States* v. *Millan*, 36 F.3d 886, 890 (9th Cir. 1994) (internal quotations omitted). The government bears the burden of showing admissibility. *United States* v. *Taheri*, 648 F.2d 598, 601 (9th Cir. 1981); *United States* v. *Perez-Esparza*, 609 F.2d 1284, 1290 (9th Cir. 1979).

Federal courts have invariably found that consents to search at the time of or shortly following an illegal stop of a vehicle are unlawful because the search is tainted by the primary illegality and the taint has not been

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[11] In the context of a confession obtained after an illegal arrest, this court held that, in order to be admissible, such statements must not only "meet the Fifth Amendment standard of voluntariness but . . . be 'sufficiently an act of free will to purge the primary taint.'" *United States* v. *Ricardo D.*, 912 F.2d 337, 342 (9th Cir. 1990).

purged.[12] That makes sense to us. Ordinarily, when a car is illegally stopped, the search that follows will be a product of that stop, as will any consent to that search. Here, the interrogation, consent and search flowed directly from the stop. *United States* v. *Hernandez*, 55 F.3d 443, 447 (9th Cir. 1995); *Millan*, 36 F.3d at 890. No events occurred after the stop that served to purge the subsequent consent and search of the taint. Rather, the officer merely questioned Arvizu, became suspicious because of his answers, and asked for consent. This is a classic case of obtaining evidence through the exploitation of an illegal stop, as is the case in which an officer's suspicions are aroused by what he observes following the stop, and on that basis obtains such consent. Accordingly, we hold that the taint of the illegal stop was not purged by intervening events.

Because we conclude that the stop by Agent Stoddard was not supported by reasonable suspicion and that there were no intervening events that purged the taint of the illegal stop, we reverse the district court's denial of Arvizu's motion to suppress.

REVERSED and REMANDED.

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[12] *See, e.g., United States* v. *Chan-Jimenez*, 125 F.3d 1324, 1326-27 (9th Cir. 1997); *United States* v. *McSwain*, 29 F.3d 558, 563-64 (10th Cir. 1994); *United States* v. *Chavez-Villareal*, 3 F.3d 124, 127-28 (5th Cir. 1993); *United States* v. *Valdez*, 931 F.2d 1448, 1452 (11th Cir. 1991).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CR 98-157-TUC-FRZ

UNITED STATES OF AMERICA, PLAINTIFF

v.

RALPH ARVIZU, DEFENDANT

[December 7, 1998]

MOTIONS HEARING

BEFORE: HONORABLE FRANK R. ZAPATA
UNITED STATES DISTRICT COURT JUDGE
55 E. BROADWAY
TUCSON, ARIZONA 85701

APPEARANCES

FOR THE GOVERNMENT: MS. CHRIS CABANILLAS, Assistant United States Attorney.

FOR THE DEFENDANT: MS. VICTORIA BRAMBL, Assistant Federal Public Defender.

* * * * *

[134] THE COURT: Thank you.

[135] Well, the court finds that there was in fact a founded reasonable suspicion based upon reasonable objective and articulable facts for the stop in this case.

The court has to view the case in the context of what was going on out there and in the context of the information available to the officer making the stop.

First of all, there is a checkpoint out there at I-91 and Rucker Canyon Road. The road that the defendant was on is the only road east of that checkpoint that parallels I-91 that travels north away from the border, Leslie Road, starting at the border and traveling on north.

Obviously that is an item and an issue that the agents have to be aware of. That is obviously supported by the fact that they have got sensor devices on this road that is some 30 miles from the border, obviously expecting traffic that would circumvent the checkpoint using that parallel and poorly traveled road parallel the I-91 and going north and avoiding the checkpoint at the same time. That is why the sensors are important.

The fact that there was discussion about what is out there at the point that the vehicle was seen, it had already passed in that area the Rucker Canyon area that could be considered a recreation area. The next one is quite a few miles to the north up in the area of the Chiricahua National Monument.

[136] But that road is—that area is accessible through paved road I-91 and then taking paved road 181. And picking up the road from there, paved I-181, all the way to that area does not require certainly a 40-to 50-mile trip, if the facts are correct, 40-mile trip at least, through a dirt road.

It was a road that a vehicle sedan could travel on, from the information presented by Mr. Chacon. Probably not the best road to have a minivan on but nothing that would prevent a minivan from being on there.

The agent then certainly is alerted to some problem as far as the amount of traffic on the road. The only testimony that we had was that they receive a sensor hit about four times in an eight-hour shift which would be a car every two hours if you spread it out over the eight-hour period.

That certainly isn't a heavily traveled road by any stretch of the imagination if that is what is going on there and that it is all we have in terms of volume of traffic on that road in that particular area.

When the agent comes out and sees in fact a vehicle traveling north on that dirt road and sees, to his estimation, that the vehicle slows down when the vehicle sees him, slows down appreciably, that is now an articulable fact.

We put that together with the agent's knowledge that, number one, this is a road used to circumvent the checkpoint; number two, they are on shift change about this [137] time and agents are returning to the checkpoint leaving this area open. And that is information that is available to the agent which he has to consider in determining whether or not he's got a suspicious circumstance or not, and clearly it is something that he could and did consider in this case.

The type of vehicle that he observed here usually we hear testimony about some area being a notorious smuggling area. They talked about that. They also talked about the fact that a month before a very similar-type vehicle had been stopped in that very same area also carrying a load of marijuana; which clearly, given those two facts, the type of vehicle becomes important and can also become an articulable fact.

The agent himself testified having been involved in a number of stops there, all of them involving transportation of aliens in similar-type vehicles. So that also becomes an articulable fact.

The matter about posture, obviously the frozen stare, the failure to stare, all of that has been looked at. It doesn't mean whole lot in terms of articulable suspicion. But if from this the person appears to be nervous and the demeanor of the person is one that is consistent with somebody who is involved in illegal activity, then that can be considered as part of the reasonable suspicion as again a reasonable objective articulable fact.

[138] What surprises me is the defendant's testimony that he was relaxed when he saw the agent. I find it very difficult to believe that somebody carrying 125 or 128 pounds of marijuana in their vehicle is going to be relaxed when they see a law enforcement officer. I think that does not bode well for the defendant's position regarding that issue.

The agent testified that he has worked that area, that he didn't recognize this vehicle as being one from the ranches in that area. Obviously an agent is not going to know all of the vehicles nor all of the visitors that would come into an area, but, again, it is a fact that can be considered. It's not going to carry the day certainly, but certainly it is something that is worthy of consideration.

Certainly given this the agent had enough information to start observing this vehicle. When he started observing this vehicle, started to follow it, he saw some odd things about the vehicle.

First, the manner about the way the children were sitting in the vehicle; making him, in his experience, to believe that there was something in behind that back

seat and the children couldn't put their feet down. Could have been camping equipment, I suppose, had not all the other facts been there pointing to the possibility of illegal activity.

Secondly, the methodical way, mechanical way, abnormal way that the children waved off and on for a period [139] of four to five minutes without even turning around to look at the agent. This certainly was a fact that is odd and would certainly lead a reasonable officer to wonder why are they doing this and would certainly lend some weight to a reason for stopping to see if in fact they are standing on a bundle of marijuana or there is other people lying on the floor of the vehicle or something of this nature.

The registration check again, in and of itself, doesn't mean a lot. But if you have already got this vehicle in an area that gives rise to the belief that it is avoiding a checkpoint and all these other facts about the vehicle and the occupants, the behavior of the occupants, that would certainly raise a suspicion, then the registration check that comes back to an area that they know to be an often-used smuggling area, then that can also be thrown in and considered as part of the basis for a founded suspicion in this case.

So I find that there was in fact founded or reasonable suspicion based upon these facts and I find them to be reasonable and objective and articulable facts to support the stop of the vehicle.

Once the agent stops the vehicle, he approaches the driver, has some small talk, asks for his citizenship, and then asks him if he can search the vehicle. Now, the driver believes that what he consented to was that he

was asked by the agent if he could take a look around the vehicle.

[140] Now, I don't think it is reasonable to believe that when a police officer stops you and asks you that, that what he wants to do is walk around your vehicle. It is clear what he wants to do is search your vehicle. There is no lack of clarity or uncertainty that the agent was asking to search the vehicle if the defendant consented to that. The defendant told him he could. There was a consent to the search.

Now, the business about whether or not he had his hand on his gun or not, there was no testimony that the defendant was coerced in any way, he felt he was coerced in any way, talked about the agent having his hand on his gun, but that was it. So I don't find that that shows any coercion, overbearing of his will, that would make the consent illegal.

So there was a consent to search. And once the agent opened the door, smelled the marijuana, then there was obviously probable cause to search the bags within the vehicle. I specifically find that the consent covered the vehicle and anything within it. But if it didn't cover the bags within it, there was probable cause for the search of that once he saw the black bag and smelled the marijuana.

Again, it is pretty difficult to believe that in January with all the windows rolled up, as the defendant stated that they were, and only rolled down when the officer came up to talk to him, there would be 123 pounds of marijuana [141] inside the cab of the vehicle in a duffel bag and that that would not produce any odor that was—that could be smelled by a person within the vehicle.

I think the defendant's testimony—the defendant's testimony as to that is less credible than the agent's given those facts.

Based on those matters the motion to suppress is denied.

Is there anything further?

MS. BRAMBL: No, Your Honor.

THE COURT: Thank you. We stand at recess.

(The proceedings concluded at 2:55 p.m.)